SUPREME COURT, U.S.

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NO. 27

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

Kenneth Wayne Knaack and
Milton Segoviano
Petitioners,

v.

United States of America,
Respondent

Petition for Writ of Certiorari to
The United States Court of Appeals for the
Seventh Circuit

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Milton Segoviano

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States.

OPINION BELOW

Petitioners, Kenneth Wayne Knaack and Milt Segoviano, were found guilty by a jury in the United States District Court for the Northern District of Illinois, Eastern Division of having on April 12, 19[illegible] entered the Chicago Heights National Bank, the Deposits of which were insuredby Federal Deposit Insurance Corporation, with the intent to commit a larceny therein, in violation of Title 18, Sec. 2113 (a) U. S. C., as alleged in the one count indictment. Judgments were entered on said guilty findings and Knaack and Segoviana were sentenced to the custody of the Attorney General of the United States for a period of twelve and fifteen years respectively. No opinion was rendered by the trial court.

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on April 11, 1969, and is thus far unreported. The opinion is appended hereto, appendix pages 1-15.

STATEMENT OF JURISDICTION

The Judgments and sentences of the District Court were entered on March 21, 1967. The opinion of affirmance by the Court of Appeals was filed on April 11, 1969. Rehearing was denied on May 14, 1969.

An extension of time to June 20, 1969 within which to file a petition for certiorair was granted on June 17, 1969 and a further extension was granted on June 20, 1969 to file said petition on or before June 23, 1969.

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED

Did not the admission into evidence of a prior arrest and robbery charge against petitioner, Segoviano, for which he had been acquitted, the prosecution's argument to the jury and the court's instruction thereon, deny petitioner fundamental fairn ess and a fair trial?

After ten hours of deliberation and after having advised the court, in response to the court's inquiry that it could not make any projection of when it might arrive at a verdict, did not the court's modified Allen charge to the jury deny petitioner a fair trial?

Did not the trial court's advocacy for the prosecution deny petitioners fundamental fairness?

Did not the court's instruction that witnesses are presumed to speak the truth violate petitioner's constitutional right of presumption of innocence and the government's burden of proof?

CONCISE STATEMENT OF THE CASE

It was the governments version of the facts that at about 12:30 A. M. Chicago Heights police officers were dispatched to the Chicago Heights Illinois National

Bank in response toa burglar alarm. Upon their arrival, they found no evidence of any forcible entry into the bank. At the rear of the bank, the officers found the second floor fire escape door open and two men standing on the ground near the fire escape. One of the officers pursued the men who went north and then through a hole in the fence on the railway right of way which ran behind the bank. Petitioner Knaack was arrested a block north of the bank and petitioner Segoviano was arrested at 17th Street and the railroad tracks directly to the rear of the bank.

It was petitioners version of the facts that each of them was arrested by the police in the utter chaos confusion and crowd spectator interest that ensued upon the arrival of the police and ensuing chase by them.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Did not the admission into evidence of a prior arrest and robbery charge against petitioner Segoviano, for which he had been acquitted, the prosecution argument to the jury and the court's instruction thereon, deny petitioner fundamental fairness and a fair trial?

Of what betterment is it to the administration of justice for this court to repeatedly pronounce the secred constitutional rights of an accused, when an accused cannot receive a fair trial in conformity with the most simple rules of evidence? Petitioner, Segoviano testified that he had become a Chicago Heights police officer in April, 1960 and that he terminated this employment by resignation in Feb., 1964.

On cross examination the following occurred, (A. 150):

> Q. Mr. Segoviano, you say you were a police officer until early 1964 and then you resigned. Mr. Segoviano, under what circumstances did you resign from the Chicago Heights police force in February of 1964?
> A. That resignation reads, "For better-"
> Q. Under what circumstances?
> Mr. Pincham: (Defense Counsel) May I be heard?
> The Court: No, overruled. You suggested that he resigned voluntarily. He is entitled to inquire into that."

In the first place, there was no suggestion from petitioner's direct examination regarding his employment that he resigned involuntarily or that he resigned voluntarily, as erroneously surmised and stated by the trail court in the jury's presence. In the second place, even if the suggestion was that he resigned voluntarily, the circumstances of the resignation, first revealed to the court before it was admitted in the presence of the jury, had absolutely no probative value and was grossly prejudicial and inadmissible to the jury. It unjustly tilted the scales against petitioner in favor of the government.

Pursuant to defense counsel's second request, the court granted a sidebar conference out of the presence and hearing of the jury, at which time the following occurred, (A. 151):

> "Mr. Pincham: Your Honor, this man submitted a written resignation in which he stated that

there was better employment. At some time thereafter he was discharged for an alleged offense of robbery. And he is getting into something which you indicated yesterday-
The Court: I don't know what he is getting into. He was asking about the circumstances under which he resigned, which is a proper question.
Mr. Karzen: (the Prosecuting Attorney) We might as well get it on the table as to what I am getting into. It was the fact that he was forced to resign because he was arrested for robbery at McDonald's hamburger stand. The operator of McDonald's hamburger happened to be somebody that he knew and he would not testify. I realize that it was inadmissible, but I think now that the door has been opened on direct examination.
Mr. Pincham: It was brought in the case in chief that this man was a former police officer.
Mr. Karzen: To establish that the police officer knew him. You went into it on direct examination.
Mr. Pincham: No, he said that he resigned from the Chicago Heights Police Department.
The Court: Well, they can get into the circumstances of the resignation. Are you suggesting that because they didn't like the color of his hair or because he had been arrested or something-I don't see what difference it makes.
Mr. Pincham: Whether or not he was arrested?
The Court: Well, is that the reason he was asked to resign?
Mr. Pincham: No, you can get the resignation and see what it says on it.
Mr. Karzen: You can put the resignation in if you want, but it doesn't preclude inquiring about

the circumstances under which he made the resignation. I was going to get in the facts concerning the resignation.
The Court: You suggested to the jury that this man voluntarily left the Chicago Heights Police Department.
Mr. Pincham: I didn't say that.

* * *

"(The following proceedings were had in the presence and hearing of the jury:)
The Court: I think a question had been asked, Mr. Segoviano, concerning the circumstances under which you resigned from the Chicago Heights Police Department and you were about to answer that question.
The Witness: Are you talking about the resignation?
The Court: The circumstances under which you resigned.
The Witness: I was accused of a stick-up of the McDonald's Drive-In.
Mr. Brody: I object on behalf of Mr. Knaack.
The Court: The jury understands that it has nothing to do with Mr. Knaack. He was not on the Police Department, and he didn't resign. It relates only to Mr. Segoviano and the reasons for his resignation. And let me point out that it has no relevance as to whether or not he did anything in this case. Let me find out what happened to that charge.
The Witness: I was acquitted at a preliminary hearing.
The Court: It was dismissed?
The Winness: Yes.
The Court: But as a result of that charge you

resigned from the Chicago Heights Police Department?
The Witness: Yes.
Mr. Pinchan: I move that that be stricken.
The Court: No.
Mr. Pinchan: Very well.
The Court: I take it that as a result of the charge he resigned and that the charge was subsequently dismissed. That was the whole story, but it is still relevant and material as to why he resigned.

By Mr. Karzen:

Q. Mr. Segoviano, do you know a Theodore J. Meliski?
Mr. Pinchan: I object; that goes beyond the scope of direct examination.
The Court: You will have to lay a foundation as to what relevance it has to direct examination.
Mr. Karzen: Can we have a side bar conference?

(Whereupon, the following proceedings were had at the side bar, out of the hearing of the jury:)

Mr. Karzen: I should be allowed to show the full circumstances of what he called a stick-up of McDonald's.
The Court: No, nothing further on that.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

By Mr. Karzen:

Q. Isn't it true, Mr. Segoviano, that you didn't voluntarily resign, that you were, in effect, forced to resign?

Mr. Pincham: I object, the man is not on trial for resigning from the Police Department.
The Court: Objection sustained. I think the witness said that as a result of being charged with what he called a stick-up of McDonald's hamburger stand he was asked to resign and resigned and was acquitted.
Mr. Pincham: He didn't say he was asked to resign.
The Court: Were you asked to resign, Mr. Segoviano?
The Witness: Yes, I was.
The Court: I assumed that was the inference to be drawn from what he said."

This cross examination, and the court's unwarranted participation therein and repeated statement thereof in the presence of the jury, only muddied the waters. It was designed and had for its purpose to give the jury the prejudicial impression that petitioner's background was suspicious. It is impossible to conceive how petitioner's resignation from the Police Department in 1964, where he had been charged with the commission of a robbery for which he was acquitted, had any relevancy to his alleged participation in a bank burglary two years later in 1966, for which he was on trial. Of course this testimony had an illegal relevancy. It painted an unwarranted cloud of suspicion over petitioner in the eyes of the jury. It invalidly tilted the scales against him on the issue presented to the jury.

But the inquiry of petitioner's police activities did not stop there. It went indeed farther. On cross examination the following also occurred, (A. 156-157):

"Q. You are an ex-police officer and you usually go out driving at night without your driver's license?
Mr. Pincham: I object to that.
The Court: Yes, sustained, You did not have your driver's license this evening, if I understand it correctly.
The Witness: Yes, sir.
The Court: You did or didn't?
The Witness: I didn't sir. I can't say I did or I can't say I didn't. I don't remember."

The prosecutor's inquiry of petitioner's police activities did not stop here either. He was further asked on cross examination if he knew Kenneth Wayne Knaack and he testified that he knew him from having stopped him for a traffic violation when he was a police officer of Chicago Heights. (A. 155). The prosecuting attorney subsequently asked him, (A. 157):

"Q. When you stopped Kenneth Knaack for those traffic violations, did you issue any citations?
Mr. Pincham: I object to that, if the Court please.
The Court: Sustained."

Having been confronted with and having had admitted to the jury this highly inadmissible, prejudicial testimony of the petitioner's McDonald robbery and charge, petitioner was compelled to attempt to minimize its prejudicial import. He testified on re-direct examination that it was Sgt. Hogeveen who asked him to resign from the Chicago Heights police force and told him that he would either resign or he would send him to the penitentiary; that Sgt. Hogeveen handed him a typewritten form of resignation and he

signed it; that he later went to court on the charge; that Sgt. Hogeveen was present in court; that there was a hearing on the case, witnesses testified and he was acquitted, all of which occurred after he resigned. (A. 157-158). Interestingly enough, this conduct attributed to Sgt. Hogeveen by petitioner was never denied, rebutted or disputed. Thereafter, on re-cross examination of petitioner, the following testimony on his McDonald acquitted robbery charge was elicited in the presence of the jury. We here invite this Honorable Court's attention to the trial court's extensive cross examination of petitioner Segoviano, during this line of inquiry. (A. 158-164).

> The Witness who came and testified at the preliminary hearing on the charge of the robbery of the McDonald's hamburger stand was Sidney Moletsky.
> Q. Wasn't the operator of that stand an old friend of yours?
> Mr. Pincham: I object to this.
> The Court: I don't understand what the relevance of that is, Mr. Karzen.
> Mr. Karzen: Your Honor, when I wanted to go into this point before, Mr. Pincham objected, but I think Mr. Pincham has gone into the circumstances of the charge and the acquittal in some detail, and I think the government should be able to pursue the matter in some detail.
> The Court: You mean you are going to retry that case here? Not with me presiding. Some other judge has already tried it. I am not going to retry it.
> Mr. Karzen: It was a preliminary hearing.
> The Court: Whatever it was.
> Mr. Karzen: I will withdraw the question.

The Court: I am not going to retry that here, believe me.

Mr. Karzen: I will withdraw the question, your Honor.

By Mr. Karzen:

Q. You testified just now on redirect that Sergeant Hogeveen told you to resign. Can Sergeant Hogeveen bring charges against you for the Police Department or can only the Chief of Police do that?

Mr. Pincham: I object to that, if the Court please.

The Court: Yes. I think that is not proper cross. Sustained.

By Mr. Karzen:

Q. Did the Chief of Police tell you to resign?

A. The Chief-

Q. Was Sergeant Hogeveen the only one who told you to resign?

A. The Chief of Police was present.

Q. When Sergeant Hogeveen said that?

A. Yes.

Q. Was Officer Alexander present?

A. No, he wasn't.

Q. Was Demetri Petros present?

The Court: Let's find out who was present. We are talking about two conversations, if I understand it correctly. Where and when did the first one take place? Give us dates and time and the people who were present, if you will, please. We should have had that foundation to begin with, but you didn't object, Mr. Karzen, so I let Mr. Pincham go on. But there is no way to identify that converaation on the basis of the question Mr. Pincham asked.

Where, when, who was present at the first conversation that you say Sergeant Hogeveen asked you to resign? Where did it take place? What time of day or night? Who was present?
The Witness: I should answer that?
The Court: Yes.
The Witness: The date, sir, I couldn't tell. It was a weekday.
The Court: Approximately?
The Witness: In the middle of the week.
The Court: Of what month?
The Witness: Of February.
The Court: Of February?
The Witness; Yes, sir.
The Court: Of what year?
The Witness: 1964. The first confrontation, it was after 6:00 o'clock, your Honor.
The Court: After 6:00 in the evening?
The Witness: Yes.
The Court: Where did it take place?
The Witness: It took place in the garage of the Chicago Heights police station.
The Court: Early in the month of February or late in the month of February of 1964?
The Witness: I think the middle of the month, sir.
The Court: The middle of the month and the middle of the week?
The Witness: Yes.
The Court: And it took place after 6:00 o'clock?
The Witness: Yes, sir.
The Court: Approximately, how much after 6:00 o'clock?
The Witness: It was dark outside, your Honor.

The Court: And it took place in the police station garage, you say?
The Witness: Yes, sir.
The Court: Who was present?
The Witness: Just Sergeant Hogeveen.
The Court: Nobody but you and Sergeant Hogeveen?
The Witness: Yes.
The Court: When did the second conversation take place? Give us the time, place , persons present.
The Witness: Oh between 8:00 and 9:00, your Honor.
The Court: The morning or evening?
The Witness: The evening because I was on 4:00 to 12:00 shift at that time .
The Court: And where?
The Witness: In the police chief's office.
The Court: In the police chief's office, and approximately when was this? How much after the first one? How long after?
The Witness: It was a few hours, sir.
The Court: The same day?
The Witness: Yes, sir, the same day.
The Court: Oh, these two conversations both took place in mid-February, middle of the week, a few hours apart.
The Witness: Yes.
The Court: The second was in the police chief's office?
The Witness: Yes.
The Court: Who was present besides Sergeant Hogeveen?
The Witness: And the police chief.
The Court: Just the chief Orlick, is that his name?

The Witness: Chief Orlick.
The Court: At the conclusion of that, if I understand it, you submitted your resignation, is that right?
The Witness: Yes, sir. If I may use the word, sir, it was put on me either do something or get off the pot.
By Mr. Karzen:
Q. Then you were given a choice; you didn't have to resign?
A. Under those conditions, the pressure-
Q. Just answer the question, Did you have to resign? Did you have a choice?
A. They didn't give me much choice.
Q. Did you have a choice?
Mr. Pincham: Objection. He has answered the question.
The Court: Overruled. I take it he did have a choice. What were the alternatives, Mr. Segoviano? I take it that that somewhat earthy description indicates two alternatives. What were the alternatives?
The Witness: To be suspended and bring a Civil Service hearing, or resign and have a -
The Court: Or to resign, right?
The Witness: Yes, and have your own civil hearing.
The Court: What civil hearing would you have if you resigned?
The Witness: No civil hearing, sir.
The Court: Just resign, is that right?
The Witness: Right.
The Court: You would either be suspended and there would be formal charges with the Civil Service Board or police board, or what have you,

and have a hearing-
The Witness: And I would be arrested.
The Court: You would what?
The Witness: Arrested after that, after I resigned.
The Court: How could you be arrested? I don't follow you. You would be suspended is what you mean, don't you?
The Witness: Yes, sir, but after signing my resignation, I was then arrested.
The Court: After you resigned?
The Witness: Yes, sir.
By Mr. Karzen:
Q. Did they tell you they would arrest you after you resigned?
A. Yes, sir.
Q. What was the advantage to you in resigning?
Mr. Pincham: Your Honor, I object to this. Are we trying a man for resigning from the police force?
Mr. Karzen: Your Honor, I suggest Mr. Pincham introduced this subject on direct examination, not the government; the circumstances under which the defendant left the police department.
The Court: I think that is right, Mr. Pincham. Let's see if we can get it straightened out.
What was the substance of the conversation between Chief Orlick, Sergeant Hogeveen and yourself on the evening in February in Chief Orlick's office, to the best of your recollection?
The Witness: They read the charges to me, sir.
The Court: They read some formal charges to you?
The Witness: Yes.
The Court: What did they say? What did those charges say?

The Witness: I couldn't quote it. It just concerned McDonald's Drive-In stick-up.

The Court: Then what happened after that?

The Witness: Then that is when they handed me the resignation. I fugured I had more of a chance outside because of Sergeant Hogeveen being a Mexican, and Sergeant Hogeveen dislikes, he doesn't have much opinion of a Mexican, and I figured I had more of a outside chance.

By Mr. Karzen.

Q. Would Sergeant Hogeveen be the one to hear, to be the judge at your Civil Service hearing?

A. No.

Q. Then why would you fear Sergeant Hogeveen? Why would that deter you from taking a hearing? I have no further questions, your Honor.

The Court: Mr. Pincham, any further questions?

Mr. Pincham: Are you withdrawing your last question?

Mr. Karzen: No, I am not withdrawing it. If the witness will answer it -

The Court: No, I take it that the question was more or less rhetorical, wasn't it?

Mr. Pincham: Then I ask that it be withdrawn and stricken, if the Court please.

The Court: I think I will grant that motion, Mr. Pincham.

Mr. Karzen: I will wait for an answer, your Honor.

The Court: No.

The prosecuting attorney took every advantage to repeatedly call to the jury's attention that petitioner Milton Segoviano, was a resigned Chicago Heights police officer. Quite naturally, this also again emphatically called to the jury's attention his aforesaid

McDonald's robbery, arrest and charge. Even the cross examination of the defendant, Kenneth Wayne Knaack, did not escape the prosecutor's opportunity, for he was prejudicially asked, (A. 207-208):

> "A. I knew Milton Segoviano when he was an officer on the Chicago Heights police force.
> Q. How did you meet him?
> Mr. Brody: (Defense Counsel for Knaack) Judge, I am going to object, Just a minute. How he met him?
> The Court: Overruled.

By Mr. Karzen:

> Q. Under what circumstances did you meet him?
> A. He pulled me over for a traffic citation.
> Q. Did he give you a citation?
> A. No, he did not.
> Q. When was that, do you remember?
> A. I had a '63 Ford. It was in 1963, I would say."

The court, after having pursued such extensive cross examination of petitioner regarding the acquitted McDonald robbery charge and after having allowed the government to likewise pursue extensive cross examination in this area, was ultimately confronted with the dilemma of the total lack of its legal efficacy. Obviously, this episode could not be considered by the jury as any evidence of petitioner's guilt or innocence of the offense for which he was on trial. Equally obvious was the fact that the jury could not consider that he had been charged with the commission of a robbery for which he had been acquitted as any

evidence affecting his credibility. It was more emphatically obvious that evicence that petitioner had been charged with the commission of an offense for which he had been ultimately acquitted was no evidence affecting his credibility. Then, pray tell, for what legal reason was this evidence elicited and admitted? The trial court fallaciously endeavored to instruct the jury in this regard.

The court instructed the jury, (A. 304-305): "I want you to understand also that with respect to Mr. Segoviano's business with McDonald, the charge with respect to McDonald's some years ago, that that is of no evidence at all about his guilt or innocence in this case. I didn't receive it as such. I think I told you at the time that the only purpose that I let the government on cross examination go into that was that the defense on direct examination had gone into it, circumstances under which he left the Police Department of Chicago Heights. It turned out that the circumstances under which he left the Police Department of Chicago Heights involved this charge, of which he was subsequently acquitted, so that no inference is to be drawn by you at all, at all, about that prior business so far as his guilt or innocence here is concerned. It may have relevance, and that is for you to decide, as to his credibility as a witness. That is a determination you are going to have to make, and it is for that purpose only that I permitted the government to cross examine Mr. Segoviano about the circumstances of his resignation, and only then because the defense had introduced the subject on its direct examination of Mr. Segoviano." (Underscore added)

Again we say that petitioner's McDonald robbery charge obviously could not affect his credibility as a witness. Surely, his acquittal of the charge could not affect his credibility. Likewise, could not his resignation from the police force of Chicago Heights upon being so charged with the commission of said offense, and later acquitted affect his credibility. As before-stated, this evidence only clouded and muddied the evidentiary stream. It prejudicially and erroneously unbalanced the Justice Scale against petitioner. Its admission and the prosecuting attorney's and the court's extensive cross examination of him in this area, as well as the court's erroneous instructions to the jury thereon, denied petitioner a fair and impartial trial and precluded the jury from arriving at a fair and objective verdict,

. U. S. v. Yarbrough, 352 fed.(2) 491; U. S. v. Henderson, 202 fed.(2) 400, P. 406 and U. S. v. Pennix, 313 fed.(2) 524.

The prosecuting attorney did not fail to take advantage of this inadmissible prejudicial testimony in his closing summation to the jury. He argued, (292):

> "You can't trust him. He is not a credible witness because he tried to create two false inferences, two false impressions. First of all, that he left the police department voluntarily. He didn't tell you anything about that departure, not on direct. I had to bring that out on cross. He tried to hide that from you. Secondly, he creates this phony story that Hogeveen pushed him out, bullied him out, and he was afraid of the Civil Service hearing- he was afraid of

Hogeveen, that is why he didn't take the Civil Service hearing. But Hogeveen is not on the Civil Service Board. You know he was trying to fool you when he said it was because of Hogeveen that he didn't take the Civil Service hearing. He didn't take that because he was afraid to. That is not evidence directly of his guilt here, but it is evidence he was trying to fool you. * * * One other thing with Segoviano, I might note, here is an ex-police officer who is being framed, * * *."

DID NOT THE TRIAL COURT'S ADVOCACY FOR THE PROSECUTION DENY PETITIONER FUNDAMENTAL FAIRNESS?

From the trial courts inquiry participation as before set forth, on petitioner, Segoviano's, prior arrest and robbery charge it is patently clear that the trail court imbalanced tne scales of impartiality. But the trial court's interrogation participation in the trail did not stop there. Not a single witness escaped his inquiry. (A. 171-172, 175-176, 133-136, 134, 86.)

The trial court's interrogation of petitioners was even more extensive, (A. 168-169, 209, 201-204, 212-215, 215-216, 216-217, 213-214, 155-156, 164-167.) During the course of this elementary trial, the trial court asked well over five hundred questions. This was a simple bank burglary case. The issues were clearly and concisely drawn. There were no complications involved. This was not a complex or entangled fraud, embezzlement or income tax case. The intricacies of the case were clearly understandable by the most infinite mind. The government was

represented by an able Assistant United States Attorney. The government did not need or require the able assistance or advocacy of the trial court. It unbalanced the scales against the petitioners and in favor of the government.

The trial court in the case at bar overly extended itself in the trial participation as an advocate for the prosecution. U. S. v. Hill, 332 Fed. 2d 105; U. S. v. Marzano, 149 Fed. 2d 923, Billeci v. U. S., 184 Fed. 2d 394, pp. 402-403. Petitioners did not receive a fair and impartial trial. As Mr. Justice Learned Hand so aptly stated in Marzano, 149 Fed. 2d 923, p. 926:

> "*** The judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a participant, he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

On the trial court's prejudicial prosecutorial advocacy in the case at bar the Court of Appeals merely stated:

> "although we counsel restraint, because of the dangers involved in the practice, we do not find reversible error here."

THE COURT'S INSTRUCTION THAT WITNESSES ARE PRESUMED TO SPEAK THE TRUTH VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT OF PRESUMPTION OF INNOCENCE AND THE GOVERNMENT'S BURDEN OF PROOF.

The Court instructed the jury, (A. 298, 311):

> "There are a couple of things, I think, I may be able to tell you which may assist you in weighing the testimony in determining how much credibility you are going to attach to a witness's testimony. Let me point out to you that we start out assuming that a witness speaks the truth. We give him an oath, we swear the witness, and we presume from that that he will, therefore, tell the truth. We know, however, that this presumption may be outweighed in any particular witness's case. Your problem is to decide whether or not the witness should be believed. You start out assuming he is going to tell the truth, and then you have to conclude before you get through whether or not he did.
>
> * * *
>
> "I have told you that we assume witnesses tell the truth and unless that presumption is outweighed by factors which I have outlined, manner and demeanor, contradictory evidence, the extent to which they may be affected by the case, other factors."

There is no rule of law that raises a witness's testimony to the legal presumption of truthfulness. This instruction is diametrically opposed to the rule of law which imposes upon the prosecution the burden of proving its case beyond a reasonable doubt. This

instruction likewise violates the legal principle that a defendant is presumed to be innocent. This instruction has been repeatedly condemned. It was resoundingly condemned. by the Third Circuit in U. S. v. Meisch, 370 Fed. 2d 768, p. 773, and U. S. v. Johnson, 371 Fed. 2d 800, pp. 804-805; by the First Circuit in McMillen v. U. S., (1967) 386 Fed. 2d 29, pp. 32-33; and by the Fifth Circuit in Knapp v. U. S., (1963) 316 Fed. 2d 794.

AFTER TEN HOURS OF DELIBERATION AND AFTER HAVING ADVISED THE COURT, IN RESPONSE TO THE COURT'S INQUIRY, THAT IT COULD NOT MAKE ANY PROJECTION OF WHEN IT MIGHT ARRIVE AT A VERDICT, DID NOT THE COURT'S MODIFIED ALLEN CHARGE TO THE JURY DENY PETITIONERS A FAIR TRIAL?

To fully here set out the charge would only unduly lengthen this petition. The portion thereof which was most objectionable, erroneous and prejudicial to petitioners is as follows, (A. 323, 324):

> "* * * It is obvious that you have not found it easy to arrive at a unanimous conclusion as to what the evidence, in the light of my instructions, indicates should be your verdict in this case.
>
> * * *
>
> "* * * Your responsibility is, on the contrary, as I said to you this morning, to objectively, impartially, logically and fairly weigh the evidence, in the light of my instructions, and then to decide what you believe the evidence, in the light of these instructions, has established

or has not established. The case has been a somewhat long one to try. Much effort has been put into it on the part of both the government and the defendants. You were twelve people selected from the community, just as any other jury which would have to try this case over again, if you cannot arrive at an agreement, would be selected, and there is no reason to believe that twelve other people selected from this community would be any more qualified, any more competent or any more likely to arrive at an unanimous verdict than you."

Firstly, the jury's deliberations and verdict was not a question of what they believed "the evidence in the light of those instructions, has established or has not established." The issue in the case was whether the government had proved petitioners guilty beyond a reasonable doubt. This instruction was indeed confusing and, in reality, minimized the government's requisite degree of proof. Moreover, it was confusing because there was no question that the government's evidence "established" that the bank had been "burglarized." And the question for the jury's determination was not whether the government's evidence had "established" or had "not established" that petitioners committed the burglary, but rather whether the government's evidence had proven beyond a reasonable doubt that they did so.

Secondly, a jury's verdict by law is to be determined soley and only from the evidence presented to it from the witness stand and the court's instructions on said evidence. The length of time consumed in the trial of a case or the efforts put into it by the prosecution and petitioner had no lawful bearing on the jury's

deliberations or the verdicts on which it was deliberating. The time, efforts and labors that had been expended in the investigation, preparation and trial by the parties and their attorneys were most assuredly illegal and unwarranted deliberation considerations. Justice is not determined and should not be influenced by trial labor or time.

Thirdly, the court erroneously and without any evidentiary support therefor, advised the jury that it should arrive at a verdict to avoid the retrial of the case. Surely, this too was an illegal consideration in the jury's deliberation. Moreover, had the jury not arrived at a verdict, it very well may have been that the government would not have elected to retry the case. In any event, there is no evidence that the government would or would not retry it. More important, however, is the fact that the possibility of a retrial of the case was not a valid consideration for the jury in determining its verdicts, but rather the evidence and the law applicable to it. Burroughs v. U. S., 365 Fed. 2d 431, pp. 433-434; Andrews v. U. S., 309 Fed. 2d 127; Green v. U. S., 309 Fed. 2d 852, and Huffman v. U. S., 297 Fed. 2d 754, it is respectfully submitted that the giving of the aforementioned instruction was indeed erroneous.

The Court of Appeals in the case at bar merely held,

> "We doobserve that charges of this type often present a close question and district judges would be well advised to be most sparing and cautious in using them".

We pray that the petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1968 September Session, 1968

No. 16271

United States of America, Plaintiff-Appellee,	) Appeal from the) United States) District Court
v.	) for the Northern
Kenneth Wayne Knaack and Milton Segoviano, Defendants-Appellants.	) District of Ill.,) Eastern Division

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April 11, 1969

Before Castle, Chief Judge, Fairchild, and Cummings, Circuit Judges.

Fairchild, Circuit Judge. Shortly after 12:30 a.m., April 21, 1966, Kenneth Knaack and Milton Segoviano were arrested in the vicinity of the Chicago Heights National Bank. They were charged with entering this national bank with intent to commit larceny therein.[1] They were convicted by a jury, and have appealed.

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1. U.S.C. sec. 2113 (a), second paragraph.

GOVERNMENT VERSION OF THE FACTS.

At 12:30 a.m. police officers of Chicago Heights were dispatched to the bank in response to a mechanical alarm. The first to arrive were Officer LaFaive and Sergeant Hogeveen. LaFaive looked in the front door, on the east side of Halsted Street, and saw a man running up an inside stairway. Hogeveen proceeded east along Seventeenth Street (south of the bank) and around to the rear, or east end of the bank. He saw the second floor door was open and two men standing below it under a fire escape. Other officers arrived at about that time. If Hogeveen and other officers are believed, the two men turned out to be Knaack and Segoviano.

East of the bank, a railroad right of way runs north across the block, Sixteenth Street being next north from Seventeenth. Six foot cyclone fences run along the east and west sides of the right of way, from street to street. There is a hole or break in the westerly fence north of the bank.

The government's proof tended to show that the two men went north, then through the hole in the fence, then east across the tracks, and then north. They were followed by Hogeveen. Other officers arrived at the intersection of Sixteenth Street and the right of way and the two men changed their direction. Then there was a confrontation on the right of way between Hogeveen and the two, whom he identified as Knaack and as Segoviano, with the latter of whom he was well acquainted.

Hogeveen and Segoviano had drawn guns, but neither shot. Knaack and Segoviano separated. Hogeveen pursued Knaack and arrested him up against the east fence, with assistance from officers Petros and Jack, who had moved down from Sixteenth Street. Segoviano ran toward Seventeenth, and was arrested within the right of way by Officer Alexander and merchant patrolman Angell.

Knaack was wearing an empty holster and a revolver was later found near where he was arrested. He had brown leather gloves, a cutting torch tip, and a pair of dark welding type glasses.

Segoviano was carrying a .45 automatic, a carbine, and ammunition. He had a walkie-talkie in his belt, and had in his clothing two concrete nails and two books of paper matches. Just before arrest he threw aside a knapsack containing more ammunition, a wrench, and a plastic face mask. Inside the bank were found tooks and acetylene welding equipment and there was evidence of an attempt to cut open the night depository. The inference could readily be drawn that persons had entered the bank for the purpose of larceny, and that Knaack or Segoviano, or both, had either entered it or were actively aiding those who had.

DEFENSE VERSION OF THE FACTS

Each defendant, however, testified that he had come into the neighborhood independently and innocently, and had his curiosity aroused by the activity of the police and squad cars. Each denied being one of the two men followed by Hogeveen and each testified he was arrested in a different place and under different circumstances from those related in government testimony. Each denied possession of firearms and the other items of equipment referred to.

Knaack said he had been walking toward a tavern on Sixteenth Street just west of the right of way. He watched what was going on from the westerly fence and was arrested there by Hogeveen.

Segoviano said he was driving west on Seventeenth Street, but found it blocked by people and squad cars. He drove into a parking lot north of Seventeenth Street and east of the easterly right of way fence. He left his car and saw a man running south through the parking lot and into the street. He saw Alexander arrest the man (claimed to be John Mangano) in the middle of Seventeenth Street. Alexander arrested Segoviano on the sidewalk immediately thereafter. Segoviano did not know how his car had been returned to his home after his arrest.

In summary, each defendant claims he was a bystander who was arrested by mistake, in the confusion, but that thereafter the

police were framing him by perjured testimony as to the circumstances of his arrest, and as to his possession of firearms and other equipment related to that which was found in the bank.

A jury question was presented by conflicting testimony. We shall state further details in discussing the points which defendants argue.

1. Reference to a previous arrest of Segoviano. Hogeveen testified that he recognized Segoviano and called him by name during their encounter on the right of way; that Hogeveen knew him well "through working with him as an ex-police officer." Segoviano's counsel chose not to leave the subject in that posture. He asked Segoviano on direct examination when he went on the police force and when he terminated his employment. Segoviano testified, in response to further questions, that he "resigned" and took up employment at Republic Steel.

On cross-examination, government counsel asked "under what circumstances" he resigned, the court overruled a defense objection, and Segoviano answered, "I was accused of a stick-up of the McDonald's Drive-In" Judge Will then told the jury that this incident "has no relevance as to whether or not he did anything in this case", and the judge brought out that the charge against Segoviano was dismissed.

On redirect examination, counsel went into the subject again, and brought out that it was Hogeveen who asked Segoviano to resign, and that Hogeveen threatened him in two conversations.

On recross-examination, the subject was raised again, and Judge Will asked a number of questions which brought out the circumstances of the two conversations.

In the course of instructing the jury, Judge Will explained that the charge about McDonald's was not evidence at all about guilt or innocence in this case; that the government had been permitted to go into the circumstances under which Segoviano left the police department because the defense had first gone into it, and that it might have relevance, if the jury should so decide, as to Segoviano's credibility.

Doubtless the fact that Segoviano had been charged with a holdup and forced to resign as a police officer did not help his case, and government counsel made use of it by claiming, in arguing Segoviano's lack of credibility, that he had tried to create the impression that he had left the police department voluntarily. But we think that Segoviano and his counsel made the choices which resulted in these facts being brought out.

2. The claim that the court "castrated the defense", Judge Will is said to have accomplished this horrendous mayhem

by rulings and instructions which told the jury to disregard the defendants' version of the facts. As will be seen, there is no substance to the claim.

The first rulings complained of were made during cross-examination of Officer Alexander during the government's case in chief. He was asked about the arrest of John Mangano. Alexander said he had seen Mangano in the police station, while under arrest, but did not know where he was arrested. Judge Will sustained objections to further questions about Mangano's arrest. He ruled, correctly in the light of the record up to then, that Mangano's arrest was irrelevant. In a colloquy out of the hearing of the jury, it developed that Alexander's report indicated Mangano had been arrested in the parking lot east of the right of way by Officer Edelman. Judge Will suggested the defense call Edelman and said he would deal with the question if asked of someone who had knowledge.

Another officer, Robustelli, testified in the government's case in chief. Defense counsel, in an offer of proof, cross-examined him when the jury was not present. Robustelli testified that Mangano was in a cell at the police station for half an hour, was then interrogated by an FBI agent, and then released. A James Castle was also brought in, along with various tools and welding equipment found in his car. After

questioning, Castle was released. Judge Will denied the offer of proof, but suggested that the matter might be gone into as part of the defense if relevancy then appeared.

These rulings were correct.

Defendant Segoviano testified he parked his car in the parking lot, saw Mangano run south through the parking lot into the street, and saw Alexander arrest Mangano just before Alexander arrested Segoviano. On rebuttal, the government called Mangano and Edelman. Both testified that Mangano drove into the parking lot, and Edelman arrested Mangano in his car. Mangano testified there was no other car parked there and Edelman testified that before he arrested Mangano he had seen Alexander arrest Segoviano on the railroad tracks. There was an obvious conflict between the circumstances of the Mangano arrest as told by Mangano and Edelman and as told by Segoviano. Counsel had his opportunity to cross-examine, although he makes some claim, which is difficult to follow, that he should have been allowed to cross-examine beyond the scope of the direct.

Defendants challenge the following portion of the court's instructions:

"I want you to understand that you are deciding only the cases of these two defendants, and whether you conclude that there were more people involved or not is immaterial to this case. You are only trying these two defendants. The fact that there may or may not be other people who were involved is irrelevant and immaterial. Whether others were arrested or had something to do with the crime charged in the indictment has no bearing on the guilt or innocence of these defendants. It is not to be considered by you as either showing that they are guilty or that they are innocent. You can conclude that there were other people involved and these men weren't. You can conclude that other people were involved, but these men also were. You can conclude that no other people were involved, but these men were. This is for you to decide. But the presence or absence of other people is immaterial to the determination of the guilt or innocence of these defendants. You are going to have to decide their cases on the evidence as it relates to them.". (Italics supplied by defendants in their brief.)

Segoviano's counsel and government counsel, in argument, had both discussed the probability that more than two persons had been involved. The government was not required to

produce all who may have participated, nor to prove that Mangano or Castle was innocent.

The only pertinent issue in the record about Mangano is whether he and Edelman on the one hand, or Segoviano, on the other, correctly related the circumstances of the Mangano and Segoviano arrests. (Alexander and Angell described the Segoviano arrest consistently with Edelman, and in conflict with Segoviano.) The jury could not have misunderstood the portion of the instructions just quoted as excluding that issue from their consideration.

3. The assumption that a witness speaks the truth. Judge Will, in instructing on credibility of witnesses and weight of testimony, adverted to an assumption or presumption, applying at the start of the jury's process of evaluation, that a witness speaks the truth, and to the various factors which may outweigh the assumption or presumption.

Adverse comment on this type of formula is found in United States v. Dichiarinte (7th Cir. 1967), 385 F. 2d. 333, 339. In the case at bar, both defendants gave testimony in conflict with that of government witnesses. Applying the instruction literally, each defendant was entitled to start with the benefit of the assumption, the same as every other witness. Although we doubt

that the instruction was helpful to the jury, we see no reason to conclude that it operated unfairly to defendants.

4. Aiding and abetting. Accepting the government testimony as to the activities of Knaack and Segoviano as true, there was adequate evidence, though circumstantial, that they actively participated in carrying out the plot to enter the bank and steal from it. Others may well have been involved, and either or both defendants may have remained outside the bank, aiding and abetting those who did enter.

Judge Will gave an appropriate instruction that either defendant be found guilty if the government proved beyond a reasonable doubt that he aided or abetted others who entered the bank.

Defendants make no real point here except that the instruction was inconsistent with a comment by the court to counsel earlier in the trial that there was no basis for a finding of aiding and abetting. Judge Will changed his view, however, and the instruction, rather than the comment, was correct.

5. The Allen type charge. The jury retired to deliberate at 12:50 p.m. on Thursday. At 10:30 p.m. after counsel stipulated the jury might separate, Judge Will gave supplementary instructions, including one which was generally of the so-called Allen type, and sent the jurors home.

they resumed deliberations at 9:30 a.m. Friday and returned their verdicts at 11:30 a.m.

The instruction under attack did not contain all the elements of the supplementary instruction approved in Allen v. United States[2] nor of the Allen charge in the LaBuy manual.[3] It did include the following propositions, in substance: jurors are judges, not advocates; there is no reason to believe that twelve other jurors would be more qualified, competent, or likely to arrive at a unanimous verdict; jurors have a duty to open their minds to the analyses of other jurors; in the last analysis a juror has the duty to arrive at the position he conscientiously believes right, and jurors may ultimately come to opposite conclusions; the jurors were urged that if they had become emotionally involved, they should start over the next morning calmly and dispassionately to examine the evidence and to listen to the analyses of each other with an open mind and see if they can not arrive at a unanimous conclusion.

The instruction contained no statement that the case must be retried, except as might be implied from the expression that the jurors had been selected "just as any other jury which would have to try this case over again, if you cannot arrive at an agreement, would be selected."[4]

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2. (1896), 164 U.S. 492, 501, 17 S. Ct. 15, 41 L. Ed. 528, 530

3. 33 F.R.P. 523, 611.

4. See United States v. White (7th Cir. 1967), 382 F. 2d. 445, 447.

We conclude that the charge did not advise nor coerce any juror to join in a verdict different from one which was conscientiously his own. We do observe that charges of this type often present a close question and district judges would be well advised to be most sparing and cautious in using them.[5]

Defendants also make objections to particular phrases in the instruction, but none of them could have misled the jury in the manner suggested.

6. Claim that Judge Will was an advocate for the prosecution. Judge Will did question many, if not, most witnesses, called by both sides. He participated in that function to a substantially greater extent than is the practice of most presiding judges whose records we have read, and more than many lawyers would consider appropriate under the adversary system.

Defendants point to instances where an answer unfavorable to them was a reply to a question by the judge. In fact this did occur (as did the converse), but neither in those instances nor in the record as a whole do we find justification for the charge that he was or appeared to be an advocate for the prosecution.

Judge Will, in his charge to the jury, made reference to his practice of asking questions. He said,

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5. See U.S. v. Bates, 7th Cir. Feb. 5, 1969, p. 11 slip opinion.

"You know, because you heard me, that sometimes I ask questions of witnesses. Customarily I wait until both sides have said they have asked all the questions they want to, and then I have said I have a few questions I wanted to ask. I want you to understand that I don't ask questions because I think they are terribly important. I ask questions primarily because in the particular circumstances, I feel there are facts which have not been fully covered in the testimony which may be important. I never know what the question is going to be. The questions that I ask are not intended to help the defense or intended to help the government. They are intended to help you. The purpose in asking them is that I think you may have the same questions that are in my mind, you can't ask questions, but I can, so I ask questions without knowing where the chips will fall with respect to the answers. I do so only because it seems to me that there are gaps which ought to be covered, but they may be with respect to relatively unimportant matters. Some of the questions I asked were with respect to unimportant matters. Some, I think you may find, were with respect to important matters. That is for you to decide.

"In any event, you are not, I want you to understand, you are not to attempt to draw any special significance from the fact that I asked a question. The questions

might just as well have been asked by counsel. They weren't, and so I asked them. They have no more significance than if counsel had asked them, if the information had been adduced in the process of direct or cross examination."

Among the dangers of the practice of extensive questioning by the judge is the tendency that he may become embroiled in the issues or in conflict with counsel to an extent that his objectivity is impaired. Another is that the jury may gain an impression, correct or not, that the judge has formed an opinion on an issue which is for the jury to decide.

We have read the record carefully, with these factors in mind. We are convinced that Judge Will's questioning did not cast him in the role, real or apparent, of prosecutor, and that the impression left upon the jury was within the limits of his explanation, quoted above. Although we would counsel restraint, because of the dangers involved in the practice, we do not find reversible error here.

The judgments are affirmed.

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No. 277

In the Supreme Court of the United States

OCTOBER TERM, 1969

KENNETH WAYNE KNAACK AND MILTON SEGOVIANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1969. A petition for rehearing was denied on May 14, 1969. The time to file a petition for a writ of certiorari was extended to June 23, 1969, and again to June 26, 1969. The petition was filed on June 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

358-009—69

QUESTIONS PRESENTED

1. Whether the trial court's questioning of witnesses deprived petitioners of a fair trial.

2. Whether the government was properly permitted to cross-examine petitioner Segoviano concerning the circumstances of his resignation from the police force.

3. Whether there was error in the instructions to the jury.

4. Whether it was error to give a charge based on *Allen v. United States*, 164 U.S. 492.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois of burglary of a federally insured bank, in violation of 18 U.S.C. 2113 (Pet. App. 1).

Petitioner Knaack was sentenced to twelve years' imprisonment, and petitioner Segoviano to fifteen years' imprisonment (Pet. 1). The court of appeals affirmed (Pet. App.)

The government's evidence at trial showed that at about midnight on April 21, 1966, the Chicago Heights National Bank's alarm sounded in the Chicago Heights Police Department, and a call was issued on the police radio (A. 31, 115).[1] Officer LaFaive and Sgt. Hogeveen were the first to reach the scene (A. 32). Officer LaFaive looked through the front door and saw a man running up a stairway inside the bank (A. 31). He reported to Sgt. Hogeveen that someone was inside, and Sgt. Hogeveen radioed for help (A. 31, 116).

[1] "A." refers to Defendants-Appellants' Joint Appendix in the court of appeals.

Hogeveen then ran to the back of the bank and saw two men standing below an open fire escape door on the second floor (A. 116). Hogeveen gave chase as the two men, later discovered to be petitioners, fled towards a railroad right-of-way behind the bank. Additional police officers arrived and assisted Sgt. Hogeveen in arresting the men (A. 40–43, 69–70, 116–119). Hogeveen testified that he had petitioners under continual observation from the time he first saw them at the bank until their arrest. When he approached the men, he recognized petitioner Segoviano, who formerly had been a police officer (A. 118, 122). At the time of their arrest, petitioners had firearms and burglary tools in their possession (A. 70, 98).

Both petitioners testified at trial that they had been in the vicinity of the bank at the time of the burglary, but that they had not been together (A. 146–149, 204–209). Each of them testified that when he saw all the police in the area he went to see what was happening and was merely a spectator when he was arrested (A. 147–149, 206–207). Segoviano stated on direct examination that he had once been employed as a police officer and that he had resigned and taken another job (A. 145). Over counsel's objection, Segoviano was asked on cross-examination about the circumstances of his resignation, and he replied that the resignation was requested by his superiors after he had been arrested for robbery but that the charge had later been dismissed (A. 150–153). The trial court instructed the jury that this testimony could be considered, if the jury thought it relevant, only on the question of Segoviano's credibility as a witness and that

it had no bearing on his guilt or innocence on the present charge (A. 152–153, 304–305).

ARGUMENT

1. The court below correctly rejected petitioners' claim that the trial judge's practice of questioning witnesses deprived them of a fair trial. A trial judge does not abuse his discretion in asking questions when he believes that some part of the testimony had been left unclear. *Ray* v. *United States*, 367 F. 2d 258, 261 (C.A. 8), certiorari denied, 386 U.S. 913; *Dranow* v. *United States*, 307 F. 2d 545, 572 (C.A. 8); *Daley* v. *United States*, 231 F. 2d 123, 130 (C.A. 1), certiorari denied, 351 U.S. 964. The trial judge here was completely neutral, asking questions of both government and defense witnesses. Moreover, he specifically instructed the jury that the mere fact that he had asked the questions gave them no special significance and that the responses to his questions were to be given the same weight as the evidence elicited by counsel (A. 303–304).

2. Petitioner Segoviano contends that the district judge erred in allowing the government to cross-examine him with respect to the circumstances surrounding his resignation from the police force. As the court of appeals held, however, the government's cross-examination was proper since it was necessary to correct the erroneous impression arising from Segoviano's direct testimony that he had voluntarily resigned in order to take a better job. The trial court emphasized to the jury that the evidence went only to the question of Segoviano's credibility, if the jury

thought it relevant to that point, and not to the issue of guilt. In these circumstances there was no ground for reversal. *United States* v. *Lowe,* 234 F. 2d 919 (C.A. 3), certiorari denied, 352 U.S. 838; cf. *United States* v. *Fiorillo,* 376 F. 2d 180, 186 (C.A. 2); *United States* v. *Coduto,* 284 F. 2d 464 (C.A. 7), certiorari denied, 365 U.S. 881; *Segal* v. *United States,* 246 F. 2d 814 (C.A. 8), certiorari denied, 355 U.S. 894.

3. Petitioners object to the trial court's instructions to the jury that all witnesses are presumed to tell the truth until this presumption is outweighed by any of several possible considerations, which the judge then outlined (A. 298–302). This instruction operated neutrally, since it applied to the defense witnesses, including both petitioners, as well as to the government witnesses. Furthermore, the trial judge carefully instructed the jury with respect to determining the credibility of witnesses and the government's burden of proof (A. 299–301). The government's burden of proof was in no way diminished by the challenged instruction. See *United States* v. *Bilotti,* 380 F. 2d 649, 656 (C.A. 2), certiorari denied, 389 U.S. 944; *United States* v. *Quinn,* 398 F. 2d 298 (C.A. 7), certiorari denied, 393 U.S. 983.

4. After several hours of deliberation lasting into the evening, the jury was unable to reach a verdict. Prior to dismissing the jury for the night, the district judge gave an instruction which was similar to that approved in *Allen* v. *United States,* 164 U.S. 492 (A. 323–326). The next day, after two additional hours of deliberation, the jury returned the guilty verdicts (A. 327). The court of appeals correctly held

that the *Allen*-type instruction did not mislead or coerce any juror into a verdict in which he did not conscientiously concur. See *Hyde* v. *United States*, 225 U.S. 347; *Andrews* v. *United States*, 309 F. 2d 127 (C.A. 5); *United States* v. *Barnhill*, 305 F. 2d 164 (C.A. 6), certiorari denied, 371 U.S. 865; *Huffman* v. *United States*, 297 F. 2d 754 (C.A. 5); *United States* v. *Thomas*, 282 F. 2d 191 (C.A. 2); *Kawakita* v. *United States*, 190 F. 2d 506 (C.A. 9), affirmed, 343 U.S. 717. The judge pointed out that juries who deliberate late into the night tend to become emotionally involved, and he urged the jurors to resume the next morning calmly and dispassionately to reexamine the facts. The instruction essentially asked each juror to be willing to reexamine the premises of his position, and listen to the arguments. It made clear that in the final disposition, the conscience of each juror must govern.[2]

[2] Petitioner contends that the comment in the supplemental instruction that the jury should determine "what the evidence in light of my instructions, indicates should be [the] verdict" had the effect of diminishing the government's burden of proof. However, the instructions referred to by the judge included an appropriate charge on the burden of proof beyond a reasonable doubt (A. 295–296), and on two subsequent occasions in the *Allen* charge, the trial judge specifically used the language "guilt beyond a reasonable doubt" (A. 325).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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